

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMANUEL LEE RANDALL,

Defendant-Appellant.

UNPUBLISHED

May 25, 2006

No. 258818

Wayne Circuit Court

LC No. 04-005499-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROOSEVELT WALKER,

Defendant-Appellant.

No. 259072

Wayne Circuit Court

LC No. 04-005499-02

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendants appeal as of right their jury convictions of possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(i), and possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii). We affirm.

First, both defendants argue that the evidence was insufficient to support their convictions. After considering the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt, we disagree. See *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

Defendants claim that the evidence was insufficient to establish that they possessed the cocaine and marijuana found in the home where they were arrested. We disagree. Constructive possession may be shown by direct or circumstantial evidence. *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748, amended 441 Mich 1201 (1992). “The ultimate question is whether,

viewing the evidence in a light most favorable to the government, the evidence establishes a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised a dominion and control over the substance.” *Id.*, quoting *United States v Disla*, 805 F2d 1340, 1350 (CA 9, 1986). As explained in *Wolfe*, *supra* at 519-520:

A person need not have actual possession of a controlled substance to be guilty of possessing it. Possession may be actual or constructive. Likewise, possession may be found even when the defendant is not the owner of the recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.

. . . It is well established that a person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown. [Citations omitted.]

A sufficient nexus has been found “where the defendant was found in a sparsely furnished apartment that contained cocaine packets and large sums of money lying about in plain view,” and where the defendant “was discovered by police officers in an abandoned home, crouching over a can containing packets of cocaine in an apparent attempt to destroy them.” *Id.* at 521-523 (citations omitted).

Here, the police had information that drugs were being sold in bulk quantity from the home. A suspect was seen placing large bags containing marijuana residue in the trash. Immediately before the search, the police saw several people gathered around the kitchen table. Those persons ran when the raid began. A large amount of cocaine was found in plain view on the table, along with a sifter. A paper bag containing pictures of defendant Randall was also found on the kitchen table, along with a plastic bag apparently containing hundreds of smaller Ziploc baggies. There was a substantial trail of cocaine from the kitchen to the bathroom; a scale containing cocaine residue was found on the bathroom sink, and a large chunk of cocaine was found floating in the toilet, which appeared to have just been flushed. Defendant Walker admitted that, upon hearing the police, he ran from the bathroom to the bedroom. More cocaine was found in the bedroom, and four additional kilos were found in a hallway closet. A bulletproof vest was found in the second bedroom, through which someone attempted to exit when the raid began. Defendant Randall was found hiding in a crawl space in an upstairs bedroom, surrounded by \$1,485 in cash.

Viewed in a light most favorable to the prosecution, the evidence supported an inference that, when the police arrived, these defendants and two other codefendants were in the process of dividing a large amount of cocaine on the kitchen table, and that defendant Walker attempted to destroy it by flushing it down the toilet before running into the bedroom. Further, given that more than 5 kilos of cocaine and more than 430 grams of marijuana were found in the home, it was reasonable to infer that only trusted persons involved in the operation would be allowed to be present. The large number of Ziploc baggies found with defendant Randall’s pictures, on the same table as the cocaine, also supports an inference that he either was involved in repackaging the drugs into smaller portions, or was going to provide the baggies to the person who was doing the repackaging. Moreover, he knew the home well enough to hide in a second-floor crawl

space on short notice. Further, the evidence that defendant Randall discarded \$1,485 supports an inference of consciousness of guilt. In sum, the evidence was sufficient for a jury to conclude beyond a reasonable doubt that defendants were both part of a large drug distribution operation and had joint constructive possession of the cocaine and marijuana found in the home.

Next, defendant Randall argues that the trial court erred in denying his request for a jury instruction on the lesser included offense of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). After review de novo, we disagree. See *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

“[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Possession with intent to deliver less than 50 grams of cocaine is a necessarily included lesser offense of possession with intent to deliver 1,000 or more grams of cocaine, because the only difference between the two offenses is the amount of the illegal substance; it would not be possible to commit the greater offense without committing the lesser. See *People v McGhee*, 268 Mich App 600, 607; 709 NW2d 595 (2005), lv pending.

Here, an instruction on the lesser offense was not warranted because a rational view of the evidence did not indicate that the element distinguishing the two offenses (i.e., the amount of the controlled substance) was in dispute. See *id.* In fact, it was undisputed that more than five kilos of cocaine were found in the home. The prosecutor’s theory was that the defendants were jointly involved in a massive drug distribution operation, and that they possessed all of the drugs jointly. There was no evidence that defendant Randall was in possession of less than 50 grams of cocaine. Although defendant Randall’s attorney elicited testimony that \$1,485 would purchase approximately 28 grams of cocaine, there was no evidence that defendant Randall was in the home to make such a purchase. The trial court properly denied defendant Randall’s request for an instruction on the lesser offense.

Defendant Randall next argues that he was denied the effective assistance of counsel. We disagree. Because he did not move for a new trial or a *Ginther*¹ hearing, our review of this issue is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312, 314.

¹ *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

Defendant Randall argues that counsel was ineffective for not seeking to compel the prosecutor to reveal the identity of the confidential informant. A court may compel an informant's disclosure when "disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *People v Underwood*, 447 Mich 695, 704; 526 NW2d 903 (1994), quoting *Roviaro v United States*, 353 US 53, 60-61; 77 S Ct 623; 1 L Ed 2d 639 (1957).

[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. [*Underwood, supra* at 705, quoting *Roviaro, supra* at 62.]

Where the defendant is able to demonstrate a possible need for the information requested, the trial court is to conduct an in camera hearing to determine whether the informant could offer any testimony helpful to the defense. *Underwood, supra* at 706.

In this case, defendant Randall has not provided any reasonable explanation for why disclosure of the informant's identity would have been helpful to his defense. Absent such a showing, there is no basis to conclude that defense counsel was ineffective for not requesting disclosure of the informant's identity. Therefore, we reject this claim of error.

Defendant Randall also argues that defense counsel was ineffective for failing to pursue a theory that he was present at the location where the drugs were found only to purchase marijuana, not cocaine. The decision whether to pursue such a theory was a matter of trial strategy, however, and defendant has not overcome the presumption that counsel's decision not to pursue this theory was unsound. This Court will not second-guess counsel on matters of trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant Randall lastly argues that counsel was ineffective for not seeking to have the charges against him reduced to loitering or frequenting a drug house. The evidence disclosed that there were substantial amounts of cocaine and marijuana in the home, some of which was being divided when the police conducted their search. There was no evidence that the location was a drug house where people came to either use drugs or purchase small amounts for individual use. A motion to reduce the charges to loitering or frequenting a drug house would have been futile and, therefore, counsel was not ineffective for failing to file such a motion. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant Randall next argues that the police lacked personal knowledge of the facts stated in the affidavit for a search warrant and, therefore, there was no probable cause to issue the warrant so the evidence seized during the search should have been suppressed. Because defendant Randall did not raise this issue below, our review is limited to plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The right to be free from unreasonable searches and seizures may only be asserted by the person whose rights were infringed. *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999). “Thus, a defendant is said to have ‘standing’ to challenge a search or seizure if, under the totality of the circumstances, he has a subjective expectation of privacy in the object of the search or seizure, and the expectation of privacy is one that society is prepared to recognize as reasonable.” *Id.* “The defendant bears the burden of establishing standing.” *Id.*

Here, defendant Randall has repeatedly maintained that he did not live in the home, and did not possess any of the drugs found therein. Therefore, he has not demonstrated a reasonable expectation of privacy in the home or its contents to establish his standing to challenge the seizure. Additionally, because defendant has not shown that he had standing to challenge the seizure of the drugs, he cannot show that defense counsel was ineffective for failing to file a motion to suppress. See *Kulpinski, supra* at 27.

Because we have found no merit to defendant Randall’s issues on appeal, we reject his additional claim that the cumulative effect of a number of errors deprived him of a fair trial. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant Walker argues that the trial court’s reasonable doubt instruction lessened the prosecutor’s burden of proof and deprived him of a fair trial. Because defendant Walker did not object to the trial court’s reasonable doubt instruction at trial, this issue is unpreserved. Therefore, we review the issue for plain error affecting defendant’s substantial rights. See *Carines, supra* at 763; *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Although the trial court did not give the standard jury instruction on reasonable doubt, CJI2d 3.2, the instruction given was substantially similar to the standard instruction, and it did not dilute the burden of proof or require the jury to identify a reason for having a reasonable doubt. Viewed as a whole, the court’s instruction fairly presented the concept of reasonable doubt and sufficiently protected defendant Walker’s rights. See *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003); *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto